IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 19TH FEBRUARY 2007 / 30TH MAGHA 1928

RSA.No. 187 of 2007()

AS.129/2003 of SUB COURT, KASARAGOD
OS.251/2002 of PRL.MUNSIFF, KASARAGOD
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APPELLANT/APPELLANT/1ST DEFENDANT.

KRISHNAPPA BANGERA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

BY ADV. SRI.P.K.MUHAMMED
SRI.C.N.IBRAHIM

RESPONDENTS/RESPONDENTS/PLAINTIFF & DEFENDANTS 2 TO 10.
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1. SANJEEVA BANGERA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

2. RANA SAPALYA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

3. AITHAPPA SAPALYA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

4. SANKAPPA SAPALYA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

5. NARAYANA SAPALYA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

6. SREEDHARA SAPALYA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

7. SMT.VASANTHI, D/O. SUBBA SAPALYA,
W/O. KRISHNAPPA, RESIDING AT SALETHUR HOUSE,
KOLNADU VILLAGE & POST, BENTWAL TALUK,
DHAKSHINA KANNADA, KARNATAKA STATE.

8. MANJUNATHA BANGARA, S/O. SUBBA SAPALYA,
RESIDING AT BANDIYODU, MANGALPADY VILLAGE & POST,
KASARAGOD TALUK.

9. MOHAMMED, S/O. PALLI,
DOOR NO.VIII/637(A), BANDIYOUD, MANGALPADY VILLAGE
& POST, KASARAGOD TALUK.

10. RAGHU SHETTY, S/O. BATTU SHETTY,
DOOR NO.VIII-637(B), BANDIYODU, MANGALPADY VILLAGE
& POST, KASARAGOD TALUK.

BY //

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 19/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO. 391/07 IN R.S.A.187/07

DISMISSED

19/2/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO. 187 OF 2007

Dated 19th February 2007

J U D G M E N T

First defendant in O.S.251/02 on the file of Munsiff court, Kasargod is the appellant. First respondent is plaintiff. Respondents 2 to 10 are defendants 2 to 10. First respondent filed suit seeking a decree for partition of plaint A schedule property and allotment of 1/10th share due the deceased Kamala. Admittedly, property was allotted under Ext.A3 final decree in I.A.632/1986 in O.S.53/1983 on the file of Sub court, Kasargod. First respondent claimed that property under Ext.A3 was allotted to Kamala mother of appellant and respondents 1 to 8 jointly and Kamala died three years prior to the institution of the suit and on the death of Kamala properties are in joint possession of appellant and respondents 1 to 8 and he is entitled to get his 1/10th share separated. Appellant along with respondents 3 and 6 in their written statement contended that allotment of plaint schedule property under Ext.A3 final decree was not

for deceased Kamala and her children but only in favour of Kamala and on the death of Kamala her rights devolved on her four children and Shankara died issueless and daughters Korapalu, Deyi and Poovu are the daughters who inherited 1/3rd shares each and 1/3rd right of Deyi was released in favour of Kamala and thereafter Yamuna daughter of Korapalu had 1/3 right and Veerappa got released that right. He has 6/15 shares and three shares vested in the children of Poovu namely Babu, Dooma and Manku and appellant and respondents 2 to 10 were also made parties to the partition suit and as per final decree, Kamala got delivery the property allotted to her and Kamala along with first respondent and others filed O.S.46/1997 and during the life time Kamala executed Ext.B7 settlement deed whereunder 3¼ cents of vacant land was transferred to appellant and after Ext.B7, he constructed a shopping complex and later sold door No.MGP.8/637/A to 9th respondent and shop room No.8/637 B to 10th respondent and first respondent is not entitled to claim any share in the said buildings or property.

2. Trial court framed necessary issues. On the evidence of PW1 and Dws.1 and 2 and Exts.A1 to A13 and Exts.B1 to B15, learned Munsiff found that Ext.B7

settlement deed relied on by appellant was not proved and appellant is not entitled to claim any right under Ext.B7. Learned Munsiff also found that allotment made under Ext.A3 final decree though showed only the name of Kamala, was in fact in favour of Kamala and plaintiff and defendants 1 to 8 and therefore on the death of Kamala plaintiff is entitled to 1/9 shares. A preliminary decree was passed directing division of plaint A schedule property into 9 equal shares and allotment of one such share to first respondent. Considering the question of equities, learned Munsiff held that as building was constructed by first respondent, it is to be allotted to him at the time of final decree including it in the share due to him and defendants 3,5,7 and 8 are entitled to one share each and 6th defendant is entitled to one share to be allotted on payment of court fee. Learned Munsiff also held that defendants 9 and 10 are entitled to get the shop rooms purchased from appellant under Ext.B12 and B13 allotted to them being bonafide purchasers for valuable consideration. Appellant challenged the preliminary decree and judgment before sub court, Kasargod in A.S.129/2003 contending that learned Munsiff should have upheld Ext.B7 settlement deed and it should

have been found that under Ext.B7, 3¼ cents were gifted by his mother in favour of appellant and therefore that property is not available for partition. It was also contended that learned Munsiff should have found that allotment made under Ext.A3 final decree was not for Kamala and defendants 1 to 8 but only to Kamala and therefore the preliminary decree is to be set aside.

3. Learned Sub Judge re-analysed and re-appreciated the evidence and confirmed the decree and judgment passed by learned Munsiff and dismissed the appeal. It is challenged in this second appeal.

4. Learned counsel appearing for appellant was heard.

5. Argument of learned counsel was that a settlement deed is to be proved as provided under Indian Evidence Act and by examining DW2, the attesting witness, execution of Ext.B7 registered settlement deed was proved and courts below should not have relied on minor discrepancies and disbelieved the evidence and therefore findings of courts below are perverse and are to be set aside. Learned counsel also argued that Ext.A3 final decree shows that property allotted only to Kamala and not to respondents 1 to 8 and appellant and so findings of courts below that it was jointly allotted

to Kamala and others is unsustainable. According to learned counsel appearing for appellant, the substantial question of law involved in the appeal is whether courts below were justified in ignoring Ext.B7 registered settlement deed while upholding Exts.B12 and B13 sale deeds executed by appellant and granting a preliminary decree ignoring the allotment made under Ext.A3 final decree.

6. Ext.A1 preliminary decree and Ext.B1 judgment and Ext.A2 judgment in the final decree application along with Ext.A3 final decree in O.S.53/1983 establish that plaint A schedule property was in fact allotted not to deceased Kamala individually but to the group consisting of Kamala and her children, including plaintiff and defendants 1 to 8. Therefore, for the error committed in the final decree that allotment was to Kamala without specifying that allotment was for Kamala and her children, appellant is not entitled to contend that allotment was only to Kamala individually, Exts.A1 and A2 conclusively establish that shares were jointly allotted to Kamala and defendants 1 to 8. Courts below rightly found that plaint A schedule property was obtained not by Kamala alone but by Kamala and her children.

7. Case of appellant is that under Ext.B7 settlement deed 3.25 cents was gifted by Kamala in favour of appellant. Execution of Ext.B7 was denied by plaintiff. Appellant examined himself as DW1 and 8th defendant as DW2. According to DW1 he was not present at the time of execution of Ext.B7. To prove Ext.B7, DW2 the attesting witness was examined. Learned Munsiff and learned Sub Judge appreciated evidence of Dws.1 and 2 in the proper perspective. Evidence of DW1 establish that he was not present at the time when gift deed was allegedly executed. Though DW2 was one of the attestors to Ext.B7, his evidence does not establish that gift deed was executed by the deceased Kamala in his presence and in the presence of other attestor. Learned Munsiff and learned Sub Judge found that as per the evidence of DW2 Advocate Shankaranarayana Adiga and the scribe of Ext.B7 was present at that time. Courts below found that when the evidence of DW2 was found unreliable to prove execution, appellant should have examined Advocate Sankaranarayana Adiga or the scribe who were allegedly present at that time. On appreciation of evidence both the courts below found that on the evidence of DW2, execution of Ext.B7 was not proved. Though learned counsel appearing for appellant vehemently argued that

appreciation of evidence was perverse, on going though the judgments, I cannot agree with the submission. Evidence of DW2 is insufficient to prove execution of Ext.B7. Even according to DW2 when an advocate was present at the time of alleged execution apart from the scribe the non examination of advocate or scribe is fatal. It is more so, when Ext.B7 recites that appellant is depending on the mother and because of the love and affection property was settled in the name of appellant her son. Evidence establish that out of the children of the deceased Kamala, appellant alone was a government employee and others are agricultural workers. In such circumstances, courts below rightly held that execution of Ext.B7 was not proved. I find no substantial question involved in this appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.